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CHARLES ELMORE CROPLEY

No. ... 69

In the Supreme Court of the United States

October Term, 1929.

ANNETTE AIKEN, ADMINISTRATRIX OF THE ESTATE OF FRIEND M. AIKEN, DECEASED, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Petition for Writ of Certiorari and Brief in Support Thereof.

L. E. CAHILL,
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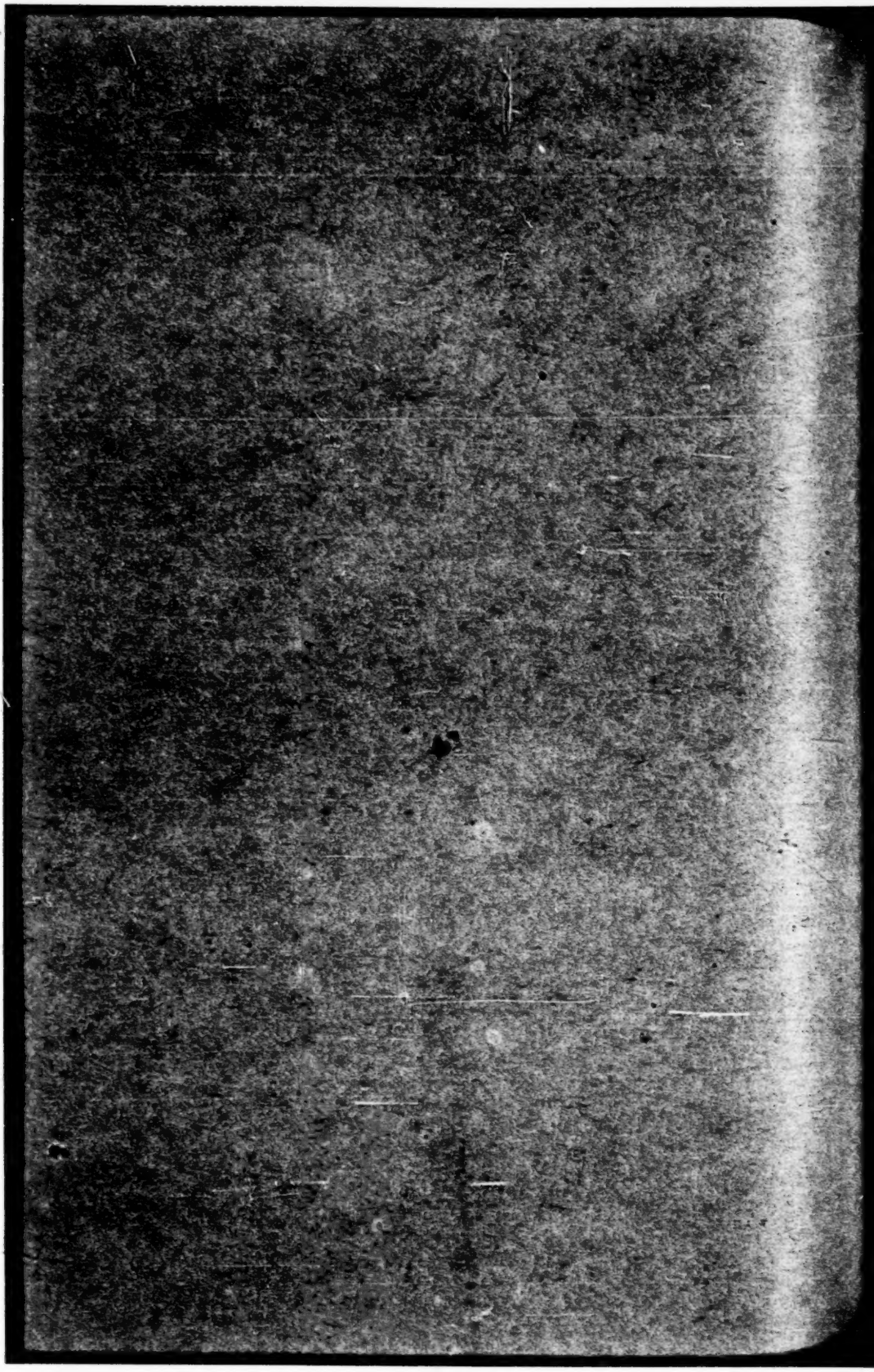
L. KARLTON MOSTELLER,
W. LEO AUSTIN,
Of Counsel.



INDEX.

	PAGE
Statement	1
Reasons for granting the petition	3
The opinions of the court below	5
Jurisdiction	5
The facts	6
Findings of fact	6
Waiver (individual)	7
Income and profits tax waiver, March 3, 1924	7
Income and profits tax waiver, Feb. 16, 1925	8
Income and profits tax waiver, Feb. 16, 1925	9
Income and profits tax waiver, Feb. 5, 1926	11
Letter of Commissioner Blair, Oct. 7, 1926	12
Statutes involved	13
Specification of error	17
Summary of argument	17
Argument	18
The decision below on the point herein discussed is at variance with the facts as shown by the record to exist	18
The alleged waiver of February 7, 1921, must be interpreted according to its terms and cannot be extended to include matters not expressed therein	22
A waiver executed after the statute has expired is void	23
The assessment-only waiver of February 7, 1921, if valid at all, expired on April 1, 1924	25
Conclusion	26

AUTHORITIES CITED.

PAGES

Act of February 13, 1925, (U. S. Code, Title 28, Sec. 347 5

Andreae v. *Redfield*, 98 U. S. 225.....21, 24

Bowers v. *New York & Albany Lighterage Co.*, 273 U. S. 346 3

Bennecke v. *Insurance Co.*, 105 U. S. 355..... 21

Bowers, Collector, v. *New York and Albany Lighterage Company*, 273 U. S. 346..... 21

Columbian Iron Works v. *Brock*, dec. by District Court, Middle District of Tenn., on 9-28-1929..... 24

Florsheim Brothers Dry Goods Company, Ltd., v. *The United States*, (Feb. 24, 1930).....6, 23

Hood Rubber Co. v. *White*, 28 Fed. (2) 54 (sustained on appeal 33 Fed. (2) 739) 22

Joy Floral Company v. *Commissioner of Internal Revenue*, 29 Fed. (2d) 865 .....4, 20, 22, 24

Pence v. *Langdon*, 99 U. S. 578..... 21

Revenue Act of 1913, Sec. E (1)..... 13

Revenue Act of 1916, Sec. 9-a 13

Revenue Act of 1917, Sec. 14-a..... 13

Revenue Act of 1918, Sec. 250-d 14

Revenue Act of 1921, Sec. 250-d 14

Revenue Act of 1924, Secs. 277-a-2, 278.....14, 15

Revenue Act of 1926, Secs. 277-a-3, 278, 1106-a.....15, 16

Revenue Act of 1928, Sec. 276-b 16

Russell, et al., v. *United States*, 278 U. S. 181..... 3

Spear & Company v. *Heiner*, 34 Fed. (2d) 795..... 24

Toxaway Mills v. *United States*, 61 Ct. Cl. 363..... 21

Walsh v. *Price*, 34 Fed. (2d) 57..... 4

Wells Brothers Company of Ill. v. *The Commissioner*, 10 B. T. A. 79 24

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1929.

No. .....

ANNETTE AIKEN, ADMINISTRATRIX OF THE ESTATE OF FRIEND M. AIKEN, DECEASED, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION *for* WRIT *of* *CERTIORARI.*

May It Please the Court:

The petitioner, Annette Aiken, administratrix of the estate of Friend M. Aiken, deceased, prays that a writ of *certiorari* issue to review the judgment of the Circuit Court of Appeals for the Eighth Circuit entered in the above entitled case on January 9, 1930.

Statement.

This action, which is based upon alleged deficiency in income and war excess profits taxes for the calendar year 1917 in the amount of $51,614.90, was begun in the United States Board of Tax Appeals, Washington, D. C., by the

filing of a petition on the 25th day of November, 1926. It was tried by the Board upon an amended petition containing eleven counts, among which were the following:

(1) Had the Commissioner authority to entertain waivers extending the period of assessment of income taxes beyond the period prescribed by law, unless and until such waivers were expressly authorized by law?

(2) Does a waiver consenting to extension of period for assessment extend by implication or otherwise the period for collection?

(3) Does a waiver consenting to extension of period for assessment of income taxes imposed under the Revenue Act of September 8, 1916, as amended on October 3, 1917, extend the period for assessment, and/or collection of war excess profits taxes imposed under the Revenue Act of October 3, 1917?

(4) Can a waiver signed after the expiration of the statute of limitations revive the rights of the Commissioner to assess and collect income and excess profits taxes?

On the 7th day of February, 1928, judgment was rendered in favor of the respondent and against the petitioner (R. 36).

The petitioner filed a petition for review in the United States Circuit Court of Appeals for the Eighth Circuit, and on the 25th day of October, 1929, the said judgment was affirmed. A petition for rehearing was denied by the said Circuit Court of Appeals on the 9th day of January, 1930.

The effect of the decision of the Circuit Court of Appeals is that the Commissioner of Internal Revenue was sus-

tained in his assumption that there existed an unbroken and perfect chain of extensions or waivers which resulted in a valid assessment of both income and war excess profits taxes alleged to be due and the questions enumerated above were all resolved in favor of the respondent.

For the language of the statute involved and a detailed statement of the facts, reference is made to the supporting brief included herewith.

Reasons for Granting the Petition.

1. The Circuit Court of Appeals erred in holding that the alleged waiver of assessment-only executed prior to statutory authority for such waiver, was valid.

2. The decision of the Circuit Court of Appeals that the purported assessment-only waiver extended the period for collection, is not in harmony with the rulings of this court.

—*Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346;

Russell, et al., v. *United States*, 278 U. S. 181.

3. The decision of the Circuit Court of Appeals that the alleged waiver extending the period for assessment of taxes imposed under the Revenue Act of 1916 as amended on October 3, 1917, extends the period for assessment and/or collection of taxes imposed by the War Excess Profits Tax Act of October 3, 1917, is not in harmony with the terms and provisions of the alleged waiver relied upon by the court.

4. The decision of the Circuit Court of Appeals that a waiver signed after the expiration of the statute of limita-

tions can revive the rights of the Commissioner to assess and collect income and war excess profits taxes is not in harmony with the ruling of the Court of Appeals, District of Columbia, in *Joy Floral Company* v. *Commissioner of Internal Revenue*, 29 Fed. (2d) 865, and that of the District Court for the Eastern District of New York in *Walsh* v. *Price*, 34 Fed. (2d) 57.

Wherefore, it is respectfully submitted that this petition for writ of *certiorari* to review the judgment of the Circuit Court of Appeals should be granted.

ANNETTE AIKEN,
Administratrix of the Estate of
Friend M. Aiken, Deceased,

By L. E. CAHILL,
Counsel for Petitioner.

L. KARLTON MOSTELLER,
W. LEO AUSTIN,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1929.

No. .....

ANNETTE AIKEN, ADMINISTRATRIX OF THE ESTATE OF FRIEND M. AIKEN, DECEASED, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI.*

I.

The Opinions of the Courts Below.

The opinion of the United Board of Tax Appeals is reported in 10 B. T. A. 553. The Circuit Court of Appeals decision is not yet reported, but was rendered on October 25, 1929, and petition for rehearing denied on January 9, 1930.

II.

Jurisdiction.

(1) The jurisdiction of this court is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of Congress of February 13, 1925 (U. S. Code, Title 28, Sec. 347).

(2) The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on October 25, 1929; and a petition for a rehearing was denied on January 9, 1930.

III.

The Facts.

The proceedings before the United States Board of Tax Appeals and the Circuit Court of Appeals involved the taxable years of 1917 and 1918, but in view of this court's decision in the case of *Florsheim Brothers Dry Goods Company, Ltd.*, v. *The United States,* (decided Feb. 24, 1930), the petitioner's contentions with respect to the year 1918 are abandoned. The questions presented in this appeal relate only to the statute of limitations for assessment and collection of the additional income and war excess profits taxes asserted by the Commissioner of Internal Revenue for the calendar year 1917.

Findings of fact:

Petitioner is a resident citizen of the United States, and was, during the years 1917, 1918, 1919 and 1920, engaged in business with his principal offices located at Tulsa, Oklahoma.

Petitioner filed an income and profits tax return for the year 1917 with the Collector on March 30, 1918. On March 18, 1919, petitioner filed with the Collector a tentative income tax return for the year 1918, and on April 28, 1919, he filed with the Collector his complete return for said year.

On February 5, 1921, petitioner executed the following instrument in writing:

WAIVER (INDIVIDUAL).

I, Friend M. Aiken, in consideration of the assurance given me by officials of the Income Tax Unit of the Bureau of Internal Revenue that my liability for all Federal taxes imposed by the Act of Congress, approved September 8, 1916, as amended by the Act of Congress approved October 3, 1917, for the year ended December 31, 1917, on my net income received from all sources in said year, shall not be determined except after deliberate, intensive and thorough consideration, hereby waive any and all statutory limitations as to the time within which assessments based upon such liability may be entered. It is understood, however, that I do not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against me for said year by the officials of the Income Tax Unit.

Friend M. Aiken,
By E. F. Blaise, (Signed)
Attorney-in-fact Taxpayer.

The above instrument was filed with respondent on February 7, 1921, and now bears on its face the following notation: "Approved D. H. Blair, Commissioner of Internal Revenue, Date Nov. 29, 1922."

On March 3, 1924, petitioner executed an instrument in writing, which was thereafter executed by respondent and which reads:

March 3, 1924.

INCOME AND PROFITS TAX WAIVER.

In pursuance of the provisions of subdivision (d) of section 250 of the Revenue Act of 1921, Friend M. Aiken, of Tulsa, Oklahoma, and the Commissioner of Internal Revenue, hereby consent to a determination,

assessment, and collection of the amount of income, excess profits, or war-profits taxes due under any return made by or on behalf of the said individual for the years 1917 and 1918 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Sec. 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes" approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau, within which assessments of taxes may be made for the year or years mentioned.

Friend M. Aiken, (Signed)
Taxpayer,

By D. H. Blair, (Signed)
Commissioner.

Under date of February 16, 1925, petitioner executed the following instrument in writing and thereafter delivered it to respondent:

February 16, 1925.

INCOME AND PROFITS TAX WAIVER.

(For taxable years ended prior to March 1, 1921.)

In pursuance of the provisions of existing Internal Revenue Laws, F. M. Aiken, a taxpayer of Tulsa, Oklahoma, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1917 under existing revenue acts, or under prior revenue acts. This

waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1925, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and *(1)* no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or *(2)* if any appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

F. M. Aiken (Signed)
By E. F. Blaise,
Attorney - in - fact
Taxpayer.

This instrument is stamped on its face "Received March 2, 1925, Service Division." It was not executed by respondent and bears the further notation in writing, "not acceptable."

On February 16, 1925, petitioner executed the following instrument in writing and thereafter delivered it to respondent:

INCOME AND PROFITS TAX WAIVER.

(For taxable years ended prior to March 1, 1921.)

In pursuance of the provisions of existing Internal Revenue Laws, F. M. Aiken, a taxpayer, of Tulsa, Oklahoma, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making an assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1918 under existing revenue acts, or under prior revenue acts. This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1925, and

shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and *(1)* no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or *(2)* if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

F. M. Aiken, (Signed)
By E. F. Blaise,
Attorney - in - Fact
Taxpayer.

This instrument was not executed by respondent. Stamped on its face is the notation "Received March 2, 1925, Service Division."

On March 12, 1925, respondent made a jeopardy assessment against petitioner covering the calendar year 1917, in the amount of $70,740.88. On the same day respondent made a jeopardy assessment against petitioner covering the calendar year 1918 in the amount of $29,739.39. Within ten days after notice and demand on both the above jeopardy assessments, petitioner filed with the Collector claims in abatement covering both said assessments. The claims were not accompanied by bonds.

On February 5, 1926, petitioner executed an instrument in writing, which was thereafter executed by respondent, and which reads:

INCOME AND PROFITS TAX WAIVER.

(For taxable years ended prior to Jan. 1, 1922.)

February 5, 1926.

In pursuance of the provisions of existing Internal Revenue Laws, Friend M. Aiken, taxpayer of Tulsa, Oklahoma, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1917, 1918, 1919, and 1920, under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and *(1)* no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or *(2)* if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

Friend M. Aiken, (Signed)
By L. E. Cahill, Attorney-in-Fact,
Taxpayer,
D. H. Blair, (Signed)
Commissioner.

Subsequently, under date not shown, petitioner executed two instruments in writing similar in all respects to the instrument of February 5, 1926, except that one of them applied only to taxes for the year 1917, and the other to taxes for the year 1918. Each of these instruments was executed by respondent on February 17, 1926.

Under date of October 7, 1926, there was mailed to petitioner from the office of respondent a letter which reads as follows:

October 7, 1926.

IT:PA:PYA-6OD
ARM
Mr. Friend M. Aiken,
Cosden Bldg.,
Tulsa, Oklahoma.

Sir: The determination of your income tax liability for the years 1917 to 1920, inclusive, as set forth in office letters of May 27, 1926, has been changed, as a result of your protest dated June 24, 1926, to disclose a deficiency in tax of $29,249.86 for 1920, and over-assessments totalling $53,000.12 for 1917, 1918 & 1919. The adjustments made are explained in the attached statement.

In accordance with the provisions of Sec. 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the U. S. Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Interal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:PYA-60D-ARM.

In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. Blair, Commissioner,

By C. R. Nash, (Signed)

Assistant to the Commissioner.

In this letter respondent determined an over-assessment for the year of 1917 of $19,126.79 and an over-assessment for the year 1918 of $28,753.09. These over-assessments reduced the jeopardy assessments for the years 1917 and 1918 to the amounts of the deficiencies above shown.

On November 25, 1926, petitioner filed with the Board his appeal from the letter of October 7, 1926.

IV.

Statutes Involved.

The pertinent provisions of the statutes are as follows:

1913 Act, section E (1);

1916 Act, section 9-A;

1917 Act, section 14-a:

"That all assessments shall be made by the Com-

missioner * * * and all persons shall be notified of the amount for which they are respectively liable on or before the 1st day of June of each successive year * * * except in cases of refusal or neglect to make such return and in cases of erroneous, false, or fraudulent returns, in which cases the Commissioner * * * shall, upon the discovery thereof, at any time within three years after said return is due, or has been made, make a return upon the information obtained * * * and the assessment * * * thereon shall be paid * * * immediately upon notification of the amount of such assessment * * *."

1918 Act, section 250-d:

"* * * The amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made * * * * *."

1921 Act, section 250-d:

"The amount of * * * any * * * taxes due under this act for prior taxable years * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit for the collection of any such taxes * * * shall be begun after the expiration of five years after the date when such return was filed * * *."

1924 Act, section 277-a-2:

"The amount of * * * taxes imposed by the * * * Revenue Act of 1916, the Revenue Act of 1917, the

Revenue Act of 1918, and by any such act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

Section 278:

"*(c)* Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in Sec. 277, for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.

"*(d)* Where the assessment * * * is made within the period prescribed in Sec. 277 * * * such tax may be collected by distraint or by a proceeding in court * * * begun within six years after the assessment of the tax. Nothing in this act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.

"*(e)* This section shall not *(1)* authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this act such assessment, distraint or proceeding was barred by the period of limitation then in existence, or *(2)* affect any assessment made, or distraint or proceeding in court begun, before the enactment of this act."

1926 Act, section 277 (a), except as provided in section 278:

"* * * *Sec. 277 (a) (3).* The amount of income, excess profits, and war profits taxes imposed by the act entitled 'An act to provide revenue, equalize duties, and encourage the industries of the United States, and for

other purposes,' approved August 5, 1909, the act entitled, 'An act to reduce tariff duties and to provide revenue for the government, and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

"* * * *Sec. 278 (c).* Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon."

Section 1106 (a):

"The bar of the statute of limitations against the United States in respect of any internal revenue tax shall not only operate to bar the remedy, but shall extinguish the liability; * * *."

1928 Act, section 276-b:

"*Waivers.* Where before the expiration of the time prescribed in section 275 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreement in writing made before the expiration of the period previously agreed upon."

V.

Specification of Error.

The errors which petitioner urges as ground for the granting of the writ of *certiorari* and for the reversal of the judgment of the Circuit Court of Appeals for the Eighth Circuit are:

(a) That the court erred in holding that the deficiency for 1917 as determined by the Commissioner of Internal Revenue was not barred of collection by the statute of limitations.

VI.

Summary of Argument.

1. Since the tax was not assessed until after the expiration of the period provided for by law, and further since the tax has not yet been collected, it is necessary to look to the waivers signed by the taxpayer and the Commissioner to determine *(a)* whether the assessment was valid or not, and *(b)* if the tax is still collectible.

2. The waiver of 1921, if valid at all and binding upon the taxpayer, extended the statute of limitations only for the purpose of assessment and did not extend the period for collection.

3. The alleged waiver of 1921 did not specifically or by inference mention taxes imposed by the War-Excess Profits Tax Act of 1917.

4. No other waiver was signed until after the period for assessment and collection, as provided by the statutes had expired.

5. The waiver of 1924 having been signed after the expiration of the statute of limitations, but within the period for assessment—not collection—as extended by the alleged waiver of 1921, does not revive the authority of the Commissioner to collect any income taxes asserted to have been waived by the alleged waiver of 1921, nor does it revive the authority of the Commissioner to assess, and/or collect any taxes imposed by the War Excess Profits Tax Act of 1917.

VII.

ARGUMENT.

POINT A.

The decision below on the point herein discussed is at variance with the facts as shown by the record to exist.

On November 23, 1921, the Revenue Act of 1921, was approved. Section 250 (d) of this act provided that taxes due under any prior revenue act might be assessed and collected within five years from the date of the filing of the return under such law. The return of this petitioner for the year 1917 was filed on March 30, 1918 (R. 38). Therefore, without extension of the period, the respondent had until March 30, 1923, within which to make assessment.

Prior to the expiration of this period, the petitioner on February 7, 1921, filed with the respondent an alleged waiver of assessment-only of "any and all statutory limitations" as to the time within which assessments might be made upon petitioner's liability in respect to taxes "imposed by the Act of Congress, approved Sept. 8, 1916, as amended by

Act of Congress approved October 3, 1927" for the year 1917. It will be noted that this waiver was unlimited as to time, but on April 11, 1923, the Commissioner of Internal Revenue promulgated a ruling known as Mimeograph 3085, which provided that all unlimited waivers as to the time for assessment then on file for 1917 would expire on April 1, 1924.

The Circuit Court, on page 6 of its opinion, states:

"Before the expiration date so fixed by the Commissioner had arrived and on, to-wit, March 3, 1924, the appellant executed the second waiver which applied not only to 1917 taxes but also to 1918 taxes. This waiver extended the period for 'determination, assessment and collection' of 1917 & 1918 taxes for a 'period of one (1) year after the expiration of the statutory period of limitations, or the statutory period of limitations as extended by any waivers already on file with the Bureau within which assessments of taxes may be made for the year or years mentioned.'

"Appellant's return for the year 1918 was filed April 28, 1919. By the Revenue Act of 1921, the Commissioner had five (5) years, or until April 28, 1924, to assess the 1918 taxes and by the waiver this period was extended to April 28, 1925. As to the 1917 taxes there was the unlimited waiver of Feb. 7, 1921, the Commissioner's Mimeograph 3085, terminating all unlimited waivers as of April 1, 1924, and the second waiver of March 3, 1924, extending the period for one year after the expiration of the statutory period of limitations which carried this period to April 1, 1925, so that when the Commissioner's assessment of March 12, 1925, for both 1917 and 1918 taxes were made it was within the statutory period of limitations as extended by the waivers."

From the foregoing excerpts from the opinion, it is evident that the court assumed an unbroken and perfect chain of extensions or waivers which resulted in a valid assessment of both income taxes and war excess profits taxes for the year in question. The following discussion will show that no such circumstances existed.

The first and unlimited waiver filed on February 7, 1921, and which was thereafter signed and thereby accepted by the Commissioner of Internal Revenue on November 29, 1922, provided for assessment only of additional income taxes for the calendar year 1917. At the time this alleged waiver was requested by the Commissioner and signed by petitioner there was no statutory provision for waivers and the Commissioner of Internal Revenue was without authority to demand, accept or consider such waiver until passage of the Revenue Act of 1921, on November 23, 1921. The duties of the Commissioner of Internal Revenue are defined and limited by statute and where he acts without statutory authority such acts are void. (*Joy Floral Company* v. *Commissioner*, 29 Fed. (2d) 865.)

Hence the petitioner earnestly contends that the Commissioner of Internal Revenue was without authority, statutory or otherwise, to demand, accept or consider a waiver filed prior to November 23, 1921, and that the assessment waiver filed February 7, 1921, was therefore void and that authority to assess 1917 income taxes in the instant case expired on March 30, 1923. When viewed in the most favorable light, waivers executed prior to statutory provision must be construed as contracts and as such are void un-

less supported by a consideration. (*Andreae* v. *Redfield*, 98 U. S. 225.)

The petitioner further contends that section 250 (d) of the Act of 1921, superseded the waiver of February 7, 1921. (*Toxaway Mills* v. *United States*, 61 Ct. Cl. 363.) The general rule is that a waiver extends only to rights existing when it is made. (*Pence* v. *Langdon*, 99 U. S. 578, and *Bennecke* v. *Insurance Co.*, 105 U. S. 355.) Following the rule of these cases it appears that a consent authorized by the Act of 1921, is one given after its enactment. With the passage of the Act of November 23, 1921, the Commissioner had a year and four months within which to assess and collect a tax or to obtain a new waiver in conformity with the provisions of this act. He did neither the one nor the other.

In *Bowers, Collector,* v. *New York and Albany Lighterage Company*, 273 U. S. 346, this court held that the government was barred from collection after the five-year period, even though assessment had been made during the authorized period. It follows, therefore, that although this court should hold that assessment was made under the authority granted by the assessment-only waiver which was unlimited as to time, the period for collection was limited to the statutory provisions and collection was barred after March 30, 1923.

After the assessment-only waiver of February 7, 1921, was filed the Commissioner did nothing further to revive the statute of limitation until the assessment and collection waiver dated March 3, 1924, was demanded and filed. This waiver, if valid at all, did not extend the limit for collection beyond March 30, 1924. The five-year period provided by

section 250 (d) of the Revenue Act of 1921, with respect to the 1917 return filed on March 30, 1918, had expired March 30, 1923. However, if this court should hold that this waiver was valid from the date filed, then by its terms it would expire on March 3, 1925, and the Commissioner has been without authority to assess and collect the 1917 taxes since that date. This contention is supported by the decision in *Hood Rubber Co.* v. *White*, 28 Fed. (2) 54 (sustained on appeal 33 Fed. (2) 739).

Furthermore, if this court should hold that the waiver of March 3, 1924, was signed during the period of the assessment-only waiver of February 5, 1921, the facts show that the said waiver of March 3, 1924, was signed after the period for collection had expired.

POINT B.

The alleged waiver of February 7, 1921, must be interpreted according to its terms and cannot be extended to include matters not expressed therein.

Granting that the waiver of February 7, 1921, was a valid instrument, it did not operate to extend the period for assessment and collection of the taxes imposed by the War Excess Profits Tax Act of October 3, 1917. The waiver expressly states, "* * * for all Federal taxes imposed by the Act of Congress, approved September 8, 1916, as amended by Act of Congress, approved October 3, 1917, * * *." On October 3, 1917, an amendment to the Act of September 8, 1916, was approved. On the same date the War Excess Profits Tax Act was approved. This latter act is not an

amendment to the Act of September 8, 1916. This failure to include a waiver for assessment and collection of taxes imposed by the War Excess Profits Tax Act is partially corrected in the waiver executed on March 3, 1924, which, however, was executed and filed after the tolling of the statute with respect to that tax and is therefore void. The petitioner's contention with respect to the interpretation to be given the waiver of February 7, 1921, if valid for any purpose, is fully sustained by the court in *Joy Floral Co.* v. *Commissioner*, 29 Fed. (2d) 865, and certainly cannot be interpreted in a manner to extend the statute of limitations for assessment of taxes imposed by the War Excess Profits Tax Act of October 3, 1917.

This court has held that a waiver of the statute of limitations is nothing more than what it is termed on its face—waiver. (*Florsheim Brothers Dry Goods Company, Ltd., et al.*, v. *The United States*, dec., Feb. 24, 1930.) This being true, the petitioner contends that the instrument of February 7, 1921, even if found to be valid for any purpose whatsoever, is a waiver only of the statute of limitations with respect to the taxing statutes specifically mentioned therein and is not susceptible of any other interpretation. It follows, therefore, that the assessment and collection of the taxes imposed by the War Excess Profits Tax Act of October 3, 1917, have been barred since March 30, 1923.

Point C.

A Waiver Executed After the Statute Has Expired Is Void.

Petitioner contends that the assessment and collection waiver filed on March 3, 1924, was filed after the statute of

limitations had expired and was void for lack of consideration. (*Andreae* v. *Redfield*, 98 U. S. 225.) The petitioner further contends that there is no authority for the execution of waivers after the statute has run. In *Spear & Company* v. *Heiner*, 34 Fed. (2d) 795, it was held that a waiver executed after the statute has run to be effective must be supported by a consideration and that the tax collected on the theory that the waiver was valid was unlawful and plaintiff entitled to recover. The courts have similarly held in *Joy Floral Co.* v. *The Commissioner*, 29 Fed. (2d) 865; *Walsh* v. *Price*, 34 Fed. (2d) 57; *Columbian Iron Works* v. *Brock*, dec. by District Court, Middle District of Tenn., on 9-28-1929, and *Wells Brothers Company of Ill.* v. *The Commissioner*, 10 B. T. A. 79.

The question of the validity of a waiver executed after the period of limitations already had expired is now before this honorable court in the case of *Stange* v. *United States*. The petition for writ of *certiorari* in that case was granted on March 3, 1930, and bears Docket No. 554.

The assessment of the additional tax here involved was made at a time when there was no valid waiver on file and the waiver in effect at the time of such assessment was void because of having been executed after the expiration of the statutory period for assessment. The provisions of Sec. 278 (c) of the Revenue Act of 1924, relate only to an agreement entered into prior to the expiration of the statutory period. (*Joy Floral Company* v. *Commissioner*, 29 Fed. (2d) 865; *Spear and Company* v. *Heiner*, 34 Fed. (2d) 795, and *Columbian Iron Works* v. *Brock*, decided Sept. 28, 1929). Section 278 (d) of the 1924 Act can be applied only in those

cases where an assessment of the tax has been made within the statutory period and subsequent to the passage of that act.

Point D.

The assessment-only waiver of February 7, 1921, if valid at all, expired on April 1, 1924.

The period of limitation for collection expired on March 30, 1923. The period for collection having expired it is contended that the assessment and collection waiver of March 3, 1924, could not revive the right of the Commissioner to collect any taxes which might be determined to be due for 1917. The waiver of March 3, 1924, was the first waiver filed which referred in any manner to the war excess profits taxes imposed by the Act of October 3, 1917, and was submitted more than five years after the return for the year 1917 was filed. For reasons which appear in the discussion of Point C, *supra*, the right of the Commissioner to assess and collect war excess profits taxes was not revived by the assessment and collection waiver of March 3, 1924.

Conclusion.

In view of the fact that the question here involved is one of great importance in the practical administration of the revenue laws and of the large amount of money involved, it is respectfully submitted that the petition for writ of *certiorari* should be granted.

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